

1 KEHOE & ASSOCIATES
2 TY E. KEHOE, ESQ.
3 Nevada Bar No. 006011
4 871 Coronado Center Drive, Suite 200
Henderson, Nevada 89052
Telephone: (702) 837-1908
Facsimile: (702) 837-1932
Email: TyKehoeLaw@aol.com
Attorney for Dr. Lucius Blanchard

E Filed 12-4-07

7 **UNITED STATES BANKRUPTCY COURT**

8 **DISTRICT OF NEVADA**

9 In re:
10 USA COMMERCIAL MORTGAGE
COMPANY,
12 Debtor.

Case No. BK-S-06-10725-LBR
Chapter 11

Date: December 20, 2007
Time: 9:30 a.m.

14 **OPPOSITION TO USACM LIQUIDATING TRUST'S MOTION FOR SUMMARY**
JUDGMENT TO CLASSIFY CLAIM BY PECOS PROFESSIONAL PARK LIMITED
PARTNERSHIP IN PLAN CLASS A-7

16 Dr. Lucius Blanchard ("Blanchard"), by and through his counsel Ty E. Kehoe, Esq.,
17 hereby submits his Opposition to USACM Liquidating Trust's Motion for Summary Judgment
18 to Classify Claim by Pecos Professional Park Limited Partnership in Plan Class A-7 ("Motion").

20 This Opposition is based upon the Points and Authorities attached hereto, the papers and
21 pleadings on file in this action, and any oral argument to be presented at the time of the hearing
22 on the Motion.

23 Dated this 4th day of December, 2007.

KEHOE & ASSOCIATES



25 Ty E. Kehoe, Esq.
26 Nevada Bar No. 006011
27 871 Coronado Center Drive, Suite 200
Henderson, NV 89052

1
POINTS AND AUTHORITIES
2

3 **Facts**

4 The Motion has to do with a proof of claim filed by Pecos Professional Park, Limited
5 Partnership, a Nevada limited partnership (“Pecos”) related to rejection damages for USACM’s
6 rejection of a valid and legitimate commercial real property lease agreement between USACM
7 and Pecos. Dr. Lucius Blanchard is not an affiliate or insider of USACM, but is a 49% limited
8 partner of Pecos and the President of Nevada Skin & Cancer, Lucius Blanchard, M.D., Chtd., a
9 Nevada corporation which is a 1% general partner of Pecos. According to a portion of a motion
10 filed by the Trustee for the Thomas Hantges Bankruptcy, Case No. 07-13163-LBR, a copy of
11 which is attached hereto as **Exhibit A**, Institutional Equity Partners, LLC is a 49% limited
12 partner of Pecos, and USA Development Inc., is a 1% general partner of Pecos.
13
14

15 **The Plan Does Not Call for Subordination of the Pecos Proof of Claim**

16 The analysis for determining whether Pecos should be subordinated under the confirmed
17 plan (“Plan”) is quite convoluted. Counsel for Pecos has spent literally hours trying to walk
18 through dozens of steps to understand the Liquidating Trustee’s thought process. In addition,
19 Counsel for Pecos has attempted to understand the Liquidating Trustee’s analysis by
20 communicating via several emails with counsel for the Liquidating Trustee. So many possible
21 computations exist that Pecos has finally conceded its ability to understand what computation
22 the Liquidating Trustee is using to determine that Pecos’ Proof of Claim should be
23 subordinated. Thus, Pecos requests that the Liquidating Trustee clarify its specific analysis for
24 determining that the Pecos’ Proof of Claim should be subordinated.
25
26

27 In its analysis thus far, Pecos has determined the following:
28

29 Pecos is clearly not an IP party.

1 Pecos does not appear to be an affiliate of the Debtor under 11 U.S.C. 101(2) because
 2 under 11 U.S.C. 101(2)(A) Pecos does not control USACM; 11 U.S.C. 101(2)(B) is not
 3 applicable because Pecos is not a corporation as defined in Section 101(9) which specifically
 4 excludes limited partnerships, and 11 U.S.C. 101(2)(C) & (D) do not seem to be remotely
 5 applicable. Thus, it does not appear that Pecos is an affiliate of the Debtors or the IP Parties.
 6

7 Pecos does not appear to be an insider of any one of the defined Debtors, or of Hantges
 8 as an IP Party. The applicable debtor, USACM, is a corporation under 11 U.S.C. 101(31)(B),
 9 and Pecos is not a director of USACM, officer of USACM, person in control of USACM,
 10 partnership in which USACM is a general partner, general partner of USACM or a relative of
 11 USACM.
 12

13 As for Hantges as an individual under 11 U.S.C. 101(31)(A), Pecos is not a relative
 14 of Hantges, Hantges is not a general partner of Pecos, Pecos is not a general partner of Hantges,
 15 and Pecos, as shown above, is not a corporation (as defined in 11 U.S.C. 101(9)).
 16

17 The Liquidating Trustee has argued that Hantges indirectly controls Pecos through USA
 18 Development, Inc. the managing general partner of Pecos, and thus Hantges is effectively the
 19 general partner of Pecos. However, as shown above, nothing in the Code permits indirect
 20 control for purposes of Insider determination.¹ Pecos is controlled by USA Development, Inc.
 21 a separate legal entity. Hantges does not control Pecos.
 22

23 Thus, again, Pecos respectfully requests that the Liquidating Trustee file a supplemental
 24 pleading explaining the exact sections of the Plan and/or the Code upon which it is relying to
 25
 26

27 ¹ Indirect control is relevant under 11 U.S.C. 101(2) defining affiliate; however, as shown above Pecos does not
 28 appear to be an affiliate of USACM. It thus appears that the Liquidating Trustee is crossing Section 101(2) with
 101(31).

1 determine that Pecos' Proof of Claim should be subordinated, as well as the Liquidating
 2 Trustee's step by step analysis of those Plan and/or Code sections.

3 **The Debtor is Estopped from Seeking Subordination of Pecos' Proof of Claim because of**
 4 **its Actions during the Plan Confirmation Process**

5 Original counsel for Pecos filed an objection during the Plan confirmation process. That
 6 process and the argument related thereto is more fully laid out in prior counsel's Opposition to
 7 the Liquidating Trustee's objection to Pecos' Proof of Claim, which opposition was filed herein
 8 on April 19, 2007 as Docket # 3494. A true and correct copy of that brief is attached hereto as
 9 **Exhibit B**, and incorporated herein by reference. In brief summary, during the Plan
 10 confirmation and in response to Pecos' objection to the Plan, the Debtor stated as follows:

11 The Pecos Objection seeks clarification that the cure payments
 12 that are scheduled to be paid to the Pecos entities (which are the
 13 landlords of the two adjacent buildings in which the Debtors
 14 conduct business) will not be subordinated under the Plan. The
 15 Plan does not intend to do so, and again, clarifying language may
 16 be provided in the Confirmation Order. Additionally, if the
 17 Haspinov, LLC., and Pecos Professional Park Limited Partnership
 18 leases for real property are assumed, the cure payments will not be
 19 subordinated under the provisions of the Debtor's Plan.

20 The Debtor's Plan did not specifically articulate its intent to subordinate the claims of
 21 Pecos relating to the unexpired lease. Indeed, the Debtor's plan of reorganization indicated that
 22 the Debtor intended to assume the unexpired lease and to pay the Cure Payment on the Effective
 23 Date. Pecos sought clarification as it related to the Debtor's intent to subordinate its claim and
 24 received assurances that subordination was not contemplated. As a result, Pecos withdrew the
 25 objection to the Debtor's Proposed Third Amended Plan of Reorganization. USACM
 26 subsequently determined to reject the lease, which gave rise to a claim of rejection damages.
 27 Thus, the Liquidating Trustee should not now be permitted to interpret the Plan as subordinating
 28 Pecos' Proof of Claim.

1 **Subordination of the Claim of Pecos is Procedurally Improper**

2 Pursuant to the principals of equitable subordination, the court may, after notice and a
 3 hearing, subordinate all or part of an allowed claim to all or part of another allowed claim. See
 4 11 U.S.C. § 510(c). 11 U.S.C. § 510(c) does not define the principals of equitable
 5 subordination. However, generally, for courts to subordinate a claim or an interest, the holder
 6 of the subordinated claims must have engaged in inequitable conduct which resulted in injury to
 7 creditors or conferred an unfair advantage on the claimant. See Pepper v. Litton, 308 U.S. 295,
 8 60 S. Ct. 238, 84 L. Ed. 281 (1939).

9 Courts have articulated three prerequisites for equitable subordination: (1) the claimant
 10 must have engaged in some type of inequitable conduct; (2) the conduct must have resulted in
 11 injury to the creditors of the debtor or conferred unfair advantage on the claimant; and (3)
 12 equitable subordination of the claim must not be inconsistent with the provisions of the code.
 13 See In re Lazar, 83 F.3d. 306 (9th Cir. 1996).

14 Importantly, any action to subordinate under § 510(c) must be brought as an adversary
 15 proceeding. See In re Vermont Toy Work, Inc., 135 B.R. 762 (Dist. Vt. 1991); In re A. Barletta
 16 & Sons, Inc., 185 B.R. 976 (Bankr. M.D. Pa. 1995); In re Danbury Square Associates Limited
 17 Partnership, 153 B.R. 657 (Bankr. S.D.N.Y. 1993). See also Federal Bankruptcy Procedure
 18 7001(8). The adversary proceeding requirement, therefore, requires the plaintiff to plead and
 19 prove the equitable basis for subordination. In addition, the Ninth Circuit has acknowledged that
 20 “[i]f an issue must be raised through an adversary proceeding, it is not part of the confirmation
 21 process and, unless it is actually litigated, confirmation will have no preclusive effect.” In re
 22 Enwally, 368 F.3d 1165, 1173 (9th Cir. 2004). In other words, although confirmed plans are *res*
 23 *judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be
 24
 25
 26
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 28

1 brought by adversary proceeding. *Id.*; See also *In re Ransom*, 336 B.R. 790 (B.A.P. 9th Cir.
2 2005).

3 In the instant case, the USACM's proposed plan of reorganization did not articulate any
4 of the three prerequisites for equitable subordination of the claim of Pecos. Thus, even
5 assuming, *arguendo*, that equitable subordination may be accomplished through a plan of
6 reorganization, the plan of reorganization will have no preclusive effect as the procedural due
7 process requirements were not satisfied and the issues were not actually litigated.

8
9 **CONCLUSION**

10 For the foregoing reasons, Pecos respectfully requests that this court deny the Motion for
11 Summary Judgment, or alternatively require the Liquidating Trustee to more clearly define its
12 steps and analysis for arguing that Pecos Proof of Claim should be subordinated.

13
14 DATED this 4th day of December, 2007.

15 KEHOE & ASSOCIATES

16 
17

18 Ty E. Kehoe, Esq.
19 871 Coronado Center Drive, Suite 200
Henderson, Nevada 89052
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25
26
27

EXHIBIT A

Case: 07-13163-lbr Doc #: 144 Filed: 07/31/2007 Page: 1 of 17

1 Robbin L. Itkin, Esq., CA Bar # 117105 E-Filed: July 31, 2007
2 (*Admitted Pro Hac Vice*)

2 Francis J. Burke, Jr., AZ Bar # 010570,
3 CA Bar # 75970 (*Admitted Pro Hac Vice*)

STEPTOE & JOHNSON LLP

4 2121 Avenue of the Stars
5 Suite 2800

5 Los Angeles CA 90067
6 Phone: (310) 734-3200

Fax: (310) 734-3300

Email: ritkin@steptoe.com
Email: fburke@steptoe.com

9 | Brian D. Shapiro, Esq., NV Bar # 5772

Law Office of Brian D. Shapiro, LLC

10 | 624 S. 9th Street

1 | Las Vegas, NV 89101

Phone: (702) 385-5266

12 | Fax: (702) 382-2967

4 Attorneys for MICHAEL W. CARMEL,
Ch. 11 Trustee for the Estate of Thomas A. Hantges

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re:

Case No.: 07-13163-LBR

THOMAS A. HANTGES,

Chapter 11

Debtor.

DATE: August 23, 2007

TIME: 9:30 a.m.

**TRUSTEE'S MOTION FOR ORDER PURSUANT TO SECTIONS 105 AND 363 OF THE
BANKRUPTCY CODE (A) AUTHORIZING THE SALE OF THE REAL PROPERTY
LOCATED AT 4484 SOUTH PECOS ROAD, LAS VEGAS, NEVADA AND CERTAIN
PERSONAL PROPERTY SPECIFIED IN EXHIBIT "7" TO THE CARMEL
DECLARATION; (B) APPROVING CERTAIN BIDDING PROCEDURES TO OBTAIN
THE HIGHEST CASH BID; (C) REQUIRING SALE PROCEEDS TO BE
MAINTAINED IN ESCROW OR OTHER SEGREGATED ACCOUNT PENDING
DETERMINATION OF OWNERSHIP; (D) ATTACHING LIENS AND INTERESTS TO
THE SALE PROCEEDS; AND SUPPORTING MEMORANDUM OF POINTS AND
AUTHORITIES**

Case: 07-13163-lbr Doc #: 144 Filed: 07/31/2007 Page: 5 of 17

1 8. During the first weekly telephonic conference between the Creditor
2 Representatives on June 25, 2007, the Trustee first learned from one of the Creditor
3 Representatives about a proposed sale of a vacant office building entered into by the Debtor
4 after the involuntary petition had been filed and after the appointment of a trustee in this
5 Bankruptcy Case. Neither the Debtor nor his counsel, with whom the Trustee had met on June
6 21, 2007, had advised the Trustee about this proposed sale transaction. *See* Carmel Declaration
7 ¶ 7.

8 **B. Pecos Professional Park Limited Partnership**

9 9. The Pecos Property, which includes the vacant office building located at 4484 S.
10 Pecos Road, Las Vegas, Nevada, APN No. 161-19-216-002 and the personal property,
11 including, without limitation, furniture, fixtures, and equipment located in the office building
12 that is set forth on Exhibit "7" attached to the Carmel Declaration, is owned by Pecos
13 Professional Park Limited Partnership, a Nevada limited partnership ("Pecos"). *See* Carmel
14 Declaration ¶ 17. Based on the Limited Partnership Agreement dated October 21, 1992 (the
15 "LPA"), a true and correct copy of which is attached as Exhibit "1" to the Carmel Declaration,
16 Pecos' primary asset is the Pecos Property and Pecos' business is to manage the Pecos Property,
17 including, but not limited to, leasing and/or selling the Property or portions thereof (the
18 "Business"). *See* Carmel Declaration ¶ 8; LPA, Art. I, Section 1.3. The two General Partners
19 of Pecos are: USA Development, Inc., a Nevada corporation ("USA Development"), by and
20 through its President, the Debtor; and Nevada Skin & Cancer, Lucius Blanchard, M.D.,
21 Chartered, a Nevada corporation ("NSCLB"), by and through its President, Lucius Blanchard,
22 M.D. ("Dr. Blanchard"). USA Development and NSCLB have power of attorney to act for and
23 in place of the Limited Partners (as defined in the LPA). *See* LPA, Article I, Section 1.2.3.

24 10. Subject to only a few exceptions delineated in the LPA, USA Development
25 manages and controls the Business and all decisions of USA Development are binding on all of
26 the Pecos partners. *See* LPA Article IV, Section 4.1. USA Development is authorized under
27 the LPA to enter into all contracts and other agreements, including brokerage agreements. *See*
28 LPA Article IV, Section 4.1.1.

1 11. In addition to the two General Partners, USA Development and NSCLB, each of
2 which, according to the LPA, own 1% of Pecos, there are two Limited Partners: (1) Institutional
3 Equity Partners, LLC ("IEP"), owning 49%; and (2) Dr. Blanchard, as an individual, owning
4 49%. *See* LPA, Exhibit "B" and Assignments of Partnership Interest dated February 12, 1998
5 and April 30, 1999, respectively, all of which are attached as Exhibits "1" through "3" to the
6 Carmel Declaration. The Debtor has direct ownership interests in USA Development and IEP,
7 both of which, according to a review of financial information in the Hantges Related Cases
8 appear to be mere investment vehicles and have no operations or liabilities other than nominal
9 fees due the tax preparers. Accordingly, the Debtor's estate has a direct interest in the sale
10 proceeds. *See* Carmel Declaration ¶ 9.

11 12. Information gathered to date shows that USA Development was owned in its
12 entirety by Thomas and Jamie Linn Hantges as Trustees of the Hantges Family Revocable
13 Living Trust UAD 12/31/91 before the Hantges' divorce in 2003. The divorce decree indicates
14 that USA Development was awarded to the Debtor as his sole and separate property. In other
15 words, the Debtor is the sole individual who stands to benefit from any assets of USA
16 Development, the General Partner of Pecos, and thereby holds a direct, equitable interest in the
17 proceeds of any sale of property held by Pecos. Available information reflects that as of June
18 2004, IEP was owned by the Thomas A. Hantges Separate Property Trust UAD 12-24-97
19 (33.33%), the Jamie Linn Hantges Separate Property Trust UAS 6-12-97 (33.33%), and Joseph
20 D. Milanowski ("Mr. Milanowski") and/or the Milanowski Family Trust (33.33%). Further,
21 the Nevada Secretary of State identifies USAIP, another debtor before this Court, as the
22 manager of IEP, although USAIP does not appear to have any direct or indirect ownership
23 interests in IEP. *See* Carmel Declaration ¶ 10

24 **C. Marketing of the Pecos Property**

25 13. Efforts to market the Pecos Property are set forth in detail in the White
26 Declaration filed concurrently herewith. Mr. White is a Senior Investment Associate with
27 Marcus & Millichap Real Estate Investment Services of Nevada ("M&M"), who was actively
28 involved in the marketing of the Pecos Property. M&M was retained by Pecos as the exclusive

EXHIBIT B

SYLVESTER & POLEDNAK, LTD
 JEFFREY R. SYLVESTER, ESQ.
 Nevada Bar No. 4396
 7371 Prairie Falcon, Suite 120
 Las Vegas, Nevada 89128
 (702) 952-5200
Attorneys for Pecos Professional Park Limited Partnership

E-FILED April 19, 2007

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE
 COMPANY (fka USA CAPITAL)
 Debtor.

Case No. BK-S-06-10725-LBR
 Case No. BK-S-06-10726-LBR
 Case No. BK-S-06-10727-LBR
 Case No. BK-S-06-10728-LBR
 Case No. BK-S-06-10729-LBR
 Chapter 11

In re:
 USA CAPITAL REALTY ADVISORS, LLC.
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725-LBR

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC.
 Debtor.

OPPOSITION TO USACM
LIQUIDATING TRUST'S MOTION TO
CLASSIFY CLAIMS FILED BY PECOS
PROFESSIONAL PARK LIMITED
PARTNERSHIP IN PLAN CLASS A-7,
AND RESERVATION OF
COUNTERCLAIMS AND
OBJECTIONS

In re:
 USA CAPITAL FIRST TRUST DEED FUND,
 LLC.
 Debtor.

Hearing Date: April 26, 2007
Hearing Time: 9:30 a.m.

Affects:

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

Pecos Professional Park Limited Partnership ("Pecos"), by and through its attorney, Jeffrey R. Sylvester, Esq. of the law firm of Sylvester & Polednak, Ltd., hereby submits its Opposition USACM Liquidating Trust's Motion to Classify Claims Filed by Pecos Professional

Park Limited Partnership in Plan Class A -7, and Reservation of Counterclaims and Objections
[Document No. 3081].

This Opposition is made and based upon the attached Points and Authorities, the papers and pleadings on file herein, and any oral argument that the Court may entertain at the time of any hearing on this motion.

DATED this 19th day of April, 2007.

SYLVESTER & POLEDNAK, LTD.

By /s/ Jeffrey R. Sylvester

Jeffrey R. Sylvester, Esq.

7371 Prairie Falcon Road, Suite 120
Las Vegas, Nevada 89128

POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND

The Pecos Professional Lease.

1. Pecos Professional Park Limited Partnership, is a Nevada limited partnership comprised of USA Development, Inc., a Nevada corporation, and Nevada Skin and Cancer, Lucius Blanchard, M.D. Chartered, a Nevada corporation.
2. USA Commercial Mortgage Company (“USACM”) was a lessee under an “Office Lease” with Pecos as the landlord (the “Pecos Lease”).
3. Pursuant to the terms and conditions of the Pecos Lease, the USACM leased that real property located at 4484 South Pecos Road, Las Vegas, Nevada, 89121 (the “Pecos Premises”).
4. Pursuant to an “Amendment to Office Lease,” the parties agreed to extend the term of the Pecos Lease to October 31, 2010.
5. As the Debtor had not made a decision whether to assume or reject the Pecos Lease due

to the status of the bankruptcy case, “cause” under 11 U.S.C. § 365(d)(4) existed to extend the time for the Debtor to assume or reject the Pecos Lease. As a result, the Debtor and Pecos stipulated and agreed that the Debtor had until November 11, 2006, to assume or reject the Pecos Lease.

6. On November 3, 2006, Pecos and the Debtor agreed to extend the time to assume or reject the Pecos Lease until the latter or either sixty (60) days after entry of an order confirming the Debtor’s Plan of Reorganization or March 30, 2007.

The Debtor’s Proposed Plan of Reorganization.

7. The Pecos Lease was, as of the Plan confirmation date, an unexpired lease.

8. Article V, Section A, of the Debtor’s Proposed Plan provides, in relevant part as follows:

In the schedule of Executory Contracts and Unexpired Leases Filed and served in accordance with Section D of Art. 1 of the Plan, the Debtor shall set forth the executory contracts and unexpired leases that are to be assumed or assumed and assigned effective upon the effective date, and shall specify the Cure Payment, if any, that the Debtors believe must be tendered on the Effective Date, in order to provide compensation in accordance with Section 365(b)(1)(A) and (B) of the Bankruptcy Code.

9. On November 29, 2006, the USACM filed a Notice of Schedule of Executory Contracts and Unexpired Leases in connection with Debtor’s Third Amended Joint Chapter 11 Plan of Reorganization. A true and correct copy of the Notice of Schedule of Executory Contracts is annexed hereto and marked as Exhibit A.

10. Pursuant to the Notice of Schedule of Executory Contracts, USACM stated that it intended to assume that the Pecos Lease and provided for a cure payment of One Hundred and Sixty-six Thousand, Seven Hundred and Eighty-eight Dollars and Forty-two Cents (\$166,788.42) (the “Cure Payment”).

11. Pecos did not object to the assumption of the unexpired leases, nor did it dispute the Cure Payment.

Class A-7: Subordinated Claims.

12. The Debtor's Third Amended Joint Chapter 11 Plan of Reorganization attempted to subordinate the claims of non-debtor insiders. The plan provided, in relevant part, as follows:

I. *Classification:* Class A-7 consists of all Subordinated Claims against USACM.

II. *Treatment:* Payment to holders of Allowed Subordinated Claims shall be subordinated to the payment in full, plus interest, of all Allowed Penalty Claims. It is anticipated that holders of Allowed subordinated claims shall receive no distribution under the plan. In the unlikely event that cash exists after all Allowed Penalty Claims are paid in full, plus interest, the plan shall be deemed to be amended to provide that such cash be distributed Pro Rata to the holder of Allowed Subordinated Claims, plus interest. Class A-7 is impaired and the holders of Class A-7 claims are deemed to reject the plan.

13. The plan defined subordinated claims as "any and all claims of non-debtor insiders against USACM."

14. The plan defined insider as follows:

"Insider" has the meaning ascribed to this term in § (31) of the Bankruptcy Code. For purposes of this definition, the term "Affiliate" in §101(31)(e) has the meaning ascribed to that term in the plan and to the extent not included in the definition of "Affiliate" under the plan, shall include any and all persons whose business is owned or controlled by the Debtors or any insiders of the Debtors (as defined herein), or in which the Debtors or insiders of the Debtors (as defined herein) have any ownership, participation, profit sharing or any other kind of interest whatsoever.

15. Under the Debtor's broad definition of insider, Pecos could have been deemed an insider and, therefore, a subordinated claim receiving Class A-7 treatment.

Pecos Objected to the Debtors' Proposed Plan of Reorganization.

16. On December 11, 2006, Pecos filed a limited objection seeking a clarification of the Debtor's Plan of Reorganization with respect to its intent to subordinate the claims of Pecos.

17. In response, the Debtor stated as follows:

The Pecos Objection seeks clarification that the cure payments that are scheduled to be paid to the Pecos entities (which are the landlords of the two adjacent buildings in which the Debtors conduct business) will not be subordinated under the Plan. The Plan does not intend to do so, and again, clarifying the language may be provided in Confirmation Order. Additionally, if the Haspinov, LLC., and Pecos Professional Park Limited Partnership leases for real property are assumed, the cure payments will not be subordinated under the provisions of the Debtor's Plan.

See Reply Brief Supporting Confirmation of Debtor's Third Amended Joint Plan of Reorganization
at p. 54, ll. 8-13.

18. Ultimately, the Debtor rejected the lease, giving rise to the claim for rejection damages.

II.

LEGAL ARGUMENT

A. Subordination of the Claim of Pecos is Inappropriate.

The Debtor's Plan did not specifically articulate its intent to subordinate the claims of Pecos relating to the unexpired lease. Indeed, the Debtor's plan of reorganization indicated that the Debtor intended to assume the unexpired lease and to pay the Cure Payment on the Effective Date. As noted above, Pecos sought clarification as it related to the Debtor's intent to subordinate its claim and received assurances that subordination was not contemplated. As a result, Pecos withdrew the objection to the Debtor's Proposed Third Amended Plan of Reorganization. USACM subsequently determined to reject the lease, which gave rise to a claim of rejection damages. USACM now seeks to classify the claim of Pecos as Class A-7 claim subordinated to all other claims.

Pursuant to the principals of equitable subordination, the Court may, after notice and a hearing, subordinate all or part of an allowed claim to all or part of another allowed claim. See 11 U.S.C. § 510(c). 11 U.S.C. § 510(c) does not define the principals of equitable subordination. However, generally, for courts to subordinate a claim or an interest, the holder of the subordinated claims must have engaged in inequitable conduct which resulted in injury to creditors or conferred an unfair advantage on the claimant. See Pepper v. Litton 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281

(1939).

Courts have articulated three prerequisites for equitable subordination: (1) the claimant must have engaged in some type of inequitable conduct; (2) the conduct must have resulted in injury to the creditors of the debtor or conferred unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the code. See In re Lazar 83 F.3d. 306 (9th Cir. 1996).

Importantly, any action to subordinate under § 510(c) must be brought as an adversary proceeding. See In re Vermont Toy Work, Inc. 135 B.R. 762 (Dist. Vt. 1991); In re A. Barletta & Sons, Inc., 185 B.R. 976 (Bankr. M.D. Pa. 1995); In re Danbury Square Associates Limited Partnership 153 B.R. 657 (Bankr. S.D.N.Y. 1993). See also Federal Bankruptcy Procedure 7001(8). The adversary proceeding requirement, therefore, requires the plaintiff to plead and prove the equitable bases for subordination. In addition, the Ninth Circuit has acknowledged that “[i]f an issue must be raised through an adversary proceeding, it is not part of the confirmation process and, unless it is actually litigated, confirmation will have no preclusive effect.” In re Enwally, 368 F.3d 1165, 1173 (9th Cir. 2004). In other words, although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by adversary proceeding. Id.; See also In re Ransom, 336 B.R. 790 (B.A.P. 9th Cir. 2005).

In the instant case, the USACM’s proposed plan of reorganization did not articulate any of the three prerequisites for equitable subordination of the claim of Pecos. Thus, even assuming, *arguendo*, that equitable subordination may be accomplished through a plan of reorganization, the plan of reorganization will have no preclusive effect as the procedural due process requirements were not satisfied and the issues were not actually litigated.

III.

CONCLUSION

WHEREFORE, in light of the foregoing, Pecos Professional Park Limited Partnership respectfully requests that this Court enter and order denying USACM Liquidating Trust's Motion in its entirety and to award such other relief as may be just and proper.

DATED this 19th day of April, 2007.

SYLVESTER & POLEDNAK, LTD.

By: /s/ Jeffrey R. Sylvester

Jeffrey R. Sylvester, Esq.
7371 Prairie Falcon, Suite 120
Las Vegas, Nevada 89128